

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Implementation of Sections 12
and 19 of the Cable Television
Consumer Protection and
Competition Act of 1992

Development of Competition and
Diversity in Video Programming
Distribution and Carriage

MM Docket No. 92-265

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**REPLY COMMENTS OF
TIMES MIRROR CABLE TELEVISION, INC.**

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REPLY COMMENTS OF

TIMES MIRROR CABLE TELEVISION, INC.

Times Mirror Cable Television, Inc. ("Times Mirror") files these reply comments solely to respond to the initial comments of CableAmerica Corporation, a cable operator franchised, like Times Mirror's subsidiary, American Cable Television, Inc. ("ACT"), dba Dimension Cable Services, to serve Mesa, Arizona. CableAmerica claims that Dimension Cable "denies CableAmerica access to local sports programming necessary to compete in Mesa."^{1/}

CableAmerica states that Times Mirror is withholding from it certain local sports programming that Dimension Cable provides to its own customers under the title Arizona Sports Programming

^{1/} Comments of CableAmerica Corporation in response to Notice of Proposed Rulemaking, filed January 25, 1993 at 4.

Network ("ASPN").^{2/} CableAmerica advances its ASPN story to argue for an implementation of Section 628 that would require that it obtain access to ASPN on the same terms as Dimension Cable. To the contrary, CableAmerica has demonstrated the mischief, unfairness, and potential loss of competition and diversity that its view of Section 628 would create.

FACTUAL BACKGROUND

In its comments CableAmerica calls Times Mirror a "satellite cable programming vendor." This is a mischaracterization of Times Mirror and indirectly a mischaracterization of the relationship between Dimension Cable and the sports programming that CableAmerica seeks.

ASPN began in the early 1980's as a premium pay service by ACT. This company was acquired by Times Mirror Cable Television in part in 1982 and wholly in 1983. At the time ACT was

^{2/} CableAmerica also attached to its comments a "Complaint" allegedly filed pursuant to Section 628(d) of the Communications Act of 1934, as amended by Section 19 of the Cable Television Consumer Protection and Competition Act of 1992. Times Mirror is not herein responding to this document, which is untimely filed. The FCC is in this docket attempting to establish procedures and timetables for the filing of such complaints, as well as the standards under which such complaints are to be judged. Thus, the filing of this complaint is grossly premature. The Commission should notify CableAmerica that it should refile its "complaint," if it continues to believe itself aggrieved, under whatever procedures the FCC adopts in this docket. If CableAmerica pursues this complaint, Times Mirror will respond in full to it at that time and reserves all its rights in that regard.

purchased by Times Mirror, ASPN was delivered via microwave solely to ACT cable systems in the Phoenix area. It was launched in the Mesa system shortly after Times Mirror acquired that system in 1985. Prior to 1989, ACT never sold ASPN to another cable operator.

Shortly after acquiring ownership of ACT, Times Mirror changed ASPN into a basic cable service on its Phoenix area systems. Times Mirror determined to include ASPN in its basic customer acquisition campaigns and began selling advertising on ASPN. The contract with the local NBA Phoenix Suns basketball team, in effect since 1983, allowed Times Mirror to differentiate itself from over-the-air broadcasting and attract cable customers, long before CableAmerica came into the market. While the contract with the Suns was an expensive acquisition, Times Mirror determined that it was worthwhile in order to attract Phoenix area subscribers to cable television. Times Mirror wanted ASPN to be a unique local brand-name channel. In 1988, Times Mirror added portions of the programming of Prime Ticket, an independently owned regional sports network, to the ASPN programming. The resulting service was then marketed as ASPN/Prime Ticket in its Phoenix area systems, including Mesa.

The ASPN/Prime Ticket offerings continue to be an important locally produced programming service designed for Times Mirror's

Phoenix area cable operations. ASPN is not separately incorporated from Dimension Cable, nor is ASPN treated as a separate subsidiary or affiliate. It is simply a department within the local cable company, Dimension Cable. There is not even a contract in existence between Dimension Cable and ASPN since Dimension Cable does not consider ASPN a separate and distinct programming network but rather an in-house program service akin to a local origination channel. The fact that Dimension Cable carries local sports programming at the high school and college level further indicates ASPN's highly localized service.

Times Mirror has only once entered into a relationship with another cable operator to sell it the ASPN/Prime Ticket programming. In 1989, Times Mirror entered into a relationship with the United Artists cable system (now owned by TCI) in Scottsdale, Arizona. Times Mirror agreed to provide the Scottsdale system with ASPN/Prime Ticket. The Scottsdale system in exchange agreed to allow Times Mirror's advertising group, Dimension Media Services, Inc. to sell all of the Scottsdale cable system's cable advertising. It is only through this single, unique arrangement that Times Mirror has in any manner sold the ASPN/Prime Ticket service to any cable operator. The relationship with the Scottsdale system sets no precedent for terms and conditions that would be offered to any other party,

and no way compromised Times Mirror's strategy to utilize ASPN/Prime Ticket principally as a differentiating factor in Mesa and throughout its other Phoenix-area systems.

It would be difficult for Times Mirror to develop ASPN into a more comprehensive regional sports network since (1) it only holds the exclusive rights to televise 20 of the home and away games of the Phoenix Suns out of their total 82 season games, (2) it has no rights to any of the other Suns games, and (3) its license to the 20 Suns games is limited to a 75 mile radius from the city of Phoenix. For the same reasons, the ASPN channel does not fit the paradigm of the type of video programmer that Congress was concerned with in enacting Section 628 of the Communications Act. This sports channel's main purpose is to solely service Times Mirror's Phoenix systems.

CableAmerica has ample alternative sources of programming available and cannot demonstrate the competitive need for acquisition of this programming from Times Mirror. First, CableAmerica has greater channel capacity than Times Mirror in its Mesa system. CableAmerica's system currently carries 59 non-premium channels as opposed to 38 non-premium channels carried by Times Mirror. Each system carries five premium channels. CableAmerica carries three pay-per-view channels. Times Mirror carries only one. CableAmerica admits that since 1988 it has

expanded to 8,000 subscribers. CableAmerica's ability to obtain and carry more channels of programming than Times Mirror provides CableAmerica a distinct and powerful competitive advantage.

This is hardly an example where a competitive cable system can show that it cannot compete with another cable system because of the absence of particular cable programming product. To the contrary, without this distinctive programming product, Times Mirror would find it difficult to compete with CableAmerica, given CableAmerica's greater channel capacity and ability to offer more programming to subscribers. Times Mirror's ability to creatively develop this distinctive programming service for its Phoenix area systems has strengthened programming diversity, viewer choice, and competition in the Phoenix market, despite Times Mirror's being disadvantaged by a lower channel capacity.

Second, ASPN does provide some satellite programming. As discussed above, it picks up portions of Prime Ticket and it also provides portions of the New England Sports Network. But Times Mirror does not have an exclusive right to those portions of the ASPN service. CableAmerica can obtain that programming itself through the same negotiating processes that Time Mirror entered into. Instead, CableAmerica wants to bypass that risk and simply sign up for ASPN. Because CableAmerica could obtain all of this other sports programming on its own, in effect what CableAmerica

is arguing for is solely the right to access to 20 games of the Phoenix Suns professional basketball team, for which Times Mirror has negotiated a specific local contract. It would be equally logical for all of the other broadcasters in the Phoenix market to insist that they have the right to the 30 Phoenix Suns games carried over the air today exclusively by one of the local area broadcast stations.

Third, CableAmerica admits that it is able to carry the 30 Suns games on this local television station. Furthermore, CableAmerica carries other Suns games, including playoff games, which are carried on WTBS, WGN and NBC. CableAmerica appears, therefore, not to be arguing that it needs to be able to provide its viewers with access to Phoenix Suns games -- which it does today -- but rather that it should be able to provide its viewers with these particular 20 games for which Times Mirror has negotiated exclusive local rights.

ARGUMENT

The Commission should not implement Section 628 in a way that it covers situations like the wholly-owned, locally-oriented ASPN service. To do otherwise would threaten, not enhance, diversity and competition.

There is nothing improper under the antitrust laws regarding Times Mirror's actions here, and there should not be anything wrong with it under Section 628 either. As the courts realize, "[c]ompetitive and exclusionary conduct look alike." See United States Football League v. National Football League, 842 F.2d 1335, 1359 (2d Cir. 1988) (quoting Easterbrook, On Identifying Exclusionary Conduct, 61 Notre Dame L. Rev. 972, 972 (1986)). The creation of diverse, proprietary, product-differentiating products and service is competition at its best. ASPN was not created, designed or utilized to exclude CableAmerica from Mesa.

The Commission itself has recognized the value of exclusive programming and has concluded that "exclusivity is a normal competitive tool, useful and appropriate for all sectors of the industry, including cable as well as broadcasting." Syndicated Programming Exclusivity, 3 FCC Rcd 5299, 5310 (1988). Under Ninth Circuit jurisprudence that covers Arizona --- case law consistent with antitrust law generally --- this type of exclusive arrangement for programming would clearly be found to be appropriate and procompetitive. See, e.g., Three Movies Of Tarzana v. Pacific Theaters, Inc., 828 F.2d 1395 (9th Cir. 1987), cert. denied 484 U.S. 1066 (1988); Ralph C. Wilson Industries, Inc. v. Chronicle Broadcasting Co., 794 F.2d 1359 (9th Cir. 1986). See generally Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

CableAmerica's complaint rings hollow. Even a firm with lawful monopoly power (and Dimension Cable certainly is not such a firm) has no general duty to help its competitors. See, e.g., Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 375 (7th Cir. 1986), cert. denied, 480 U.S. 934 (1987); MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir.), cert. denied, 464 U.S. 891 (1983); Catlin v. Washington Energy Co., 791 F.2d 1343 (9th Cir. 1986). Even if somehow those 20 Phoenix Suns games to which ASPN has exclusive rights could be viewed as somehow special and unique, that factor would not entitle CableAmerica to obtain access to them. See, e.g., Flip Side Productions, Inc. v. Jam Productions, Inc., 843 F.2d 1024, 1034 (7th Cir.), cert. denied, 488 U.S. 909 (1988); Driscoll v. City of New York, 650 F. Supp. 1522 (S.D.N.Y. 1987).

That CableAmerica's claims for protection under Section 628 are ill-founded is underscored further by the fact that it would be impossible to determine under the antitrust laws that any price at which CableAmerica purchased ASPN would be discriminatory. Dimension Cable and ASPN do not represent a distinct buyer and seller under the antitrust laws, and there can therefore be no price discrimination between a transaction between them and a sale to a third party like CableAmerica. See, e.g., Mt. Pleasant v. Associated Electronic Cooperative, Inc., 838 F.2d 268, 276-79 (8th Cir. 1988); Russ' Kwik Carwash, Inc. v.

Marathon Petroleum Company, 772 F.2d 214 (6th Cir. 1985); Eximco, Inc. v. Trane Co., 737 F.2d 505 (5th Cir. 1984). If Dimension Cable chose to sell ASPN to CableAmerica, it could properly charge it whatever it wanted. This further demonstrates that Section 628 should not be brought into play in situations like these.

If CableAmerica were right, and Section 628 could be construed to require any cable system's local origination program service to be sold to any competitor, the clearly predictable result would be a decline in program diversity and program investment. In such circumstances, Times Mirror would obviously have to reconsider whether it was worthwhile continuing such a service in Mesa at all. Congress' aims of program diversity and competition, which the FCC is charged with preserving, would hardly be served by such a rule.

CONCLUSION

We do urge the Commission to keep in mind CableAmerica's arguments as it develops implementing regulations for Section 628. Times Mirror will respond to a proper complaint filed at the proper time under Section 628 if we must. But the goals of diversity and competition that Congress directed the FCC to pursue when it passed the 1992 Cable Act are best fulfilled by the Commission making clear in this proceeding that cable's

pursuit of programming diversity in competitive situations such as that in Mesa today are outside the scope of Section 628.

Respectfully submitted,

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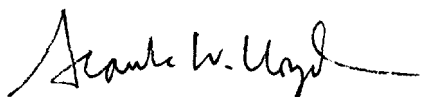
February 16, 1993

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CERTIFICATE OF SERVICE

I, Frank W. Lloyd, hereby certify that a copy of the foregoing Reply Comments of Times Mirror Cable Television, Inc. have been sent by United States mail, first class and postage prepaid, to the following on this 16th day of February, 1993:

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